STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

PETER B. BISHOP and THERESA BISHOP,

Plaintiffs-Appellants,

vs. Case No. 2005-4745-AA

CITY OF ST. CLAIR SHORES and its ZONING BOARD OF APPEALS,

Defendants-Appellees.

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OPINION AND ORDER

Plaintiffs have filed a petition for review of the decision of the City of St. Clair Shores' Zoning Board of Appeals.

This matter arises from plaintiffs' construction of a garage on their residential property in the City of St. Clair Shores. During the construction of this structure, building inspector Bill Clark inspected the cement floor which had been poured by a subcontractor on August 30, 2004. He determined that the cement floor was defective, but advised plaintiffs that the floor could be corrected by adding an additional row of cement blocks to the floor. Plaintiffs allegedly consulted with an "architect friend" at this point, who advised them that two rows of cement blocks should be added in order to avoid drainage problems. Building inspector Ron Supal inspected the completed garage on May 17, 2005, and issued an approval of the construction. However, plaintiffs were subsequently contacted by a third building inspector and informed that the garage did not conform to the city's height restrictions.

On July 18, 2005, plaintiffs appeared before St. Clair Shores' City Council[1] and requested a variance for their nonconforming garage. According to the minutes, there were only four city council members present at this meeting. A motion was made to approve the variance, and the council members present were evenly divided as to whether to grant approval. As such, the motion failed and plaintiffs' request for a variance was denied.

Inspector Dennis Cairns inspected the garage during a follow-up inspection on September 19, 2005, and determined that the garage did not comply with the height restrictions contained in the city's zoning ordinance. A misdemeanor ticket was issued on October 3, 2005, ordering plaintiff Peter Bishop to appear in the 40th District Court on a misdemeanor charge of violating the city's zoning ordinance. In response, plaintiffs filed a petition for review of the city council's decision with this Court on November 23, 2005.

The decision of a zoning board of appeals to deny a variance is reviewed "to determine whether it (1) comports with the law, (2) was the product of proper procedure, (3) was supported by competent, material, and substantial evidence on the record, and (4) was a proper exercise of reasonable discretion." *Norman Corp v City Of East Tawas*, 263 Mich App 194, 202; 687 NW2d 861 (2004) (citing MCL 125.585(11)). The reviewing court should give due deference to the agency's expertise and should not substitute its judgment for that of the agency between two reasonably differing views. *Davenport v City of Grosse Pointe Farms Bd of Zoning Appeals*, 210 Mich App 400, 405-406; 534 NW2d 143 (1995) (citations omitted). However, a zoning board of appeals must not merely repeat the language of the zoning ordinance without specifying the factual findings supporting its decision. See *Reenders v Parker*, 217 Mich App 373, 378-

[1] Apparently, the St. Clair Shores' City Council acts as the city's zoning board of appeals, and the two terms shall be used interchangeably throughout this Opinion and Order.

379; 551 NW2d 474 (1996) (citation omitted).

In support of their petition, plaintiffs point out that a landowner requesting a non-use variance need only show practical difficulty. They claim that it is unclear what standard, if any, the St. Clair Shores' City Council applied in deciding to deny their variance request. Further, plaintiffs claim that there was not competent material and substantial evidence on the record to support the city council's denial of their variance request.

In response, defendants claim that the record reveals a proper exercise of discretion based on competent, material and substantial evidence. They argue that plaintiffs' difficulties are self-created and therefore cannot serve as a basis for granting a variance. They also argue that the zoning ordinance at issue is constitutional on its face and as applied to plaintiffs.

Turning to the case at bar, the Court has carefully reviewed the minutes of the city council meeting of July 18, 2005. The minutes indicate that the council was informed that plaintiffs' garage exceeded the city's height restrictions by 1.66 feet as to the walls and 1.33 feet as to the structure's total height. An individual referred to as "Mr. Rayes" informed the council that the building inspector had told plaintiff Peter Bishop to add one row of cement blocks to the foundation, but he added two rows. Councilman Soulliere then inquired as to why two rows were used in contravention of the building inspector's direction, and Mr. Bishop replied that he had been informed that a single row would have created drainage problems and permitted water to seep into the garage. Attached to plaintiffs' request, and included in the record on appeal, are three letters from contiguous neighbors indicating their approval of plaintiffs' request, and one letter requesting that the variance be denied.

Defendants' contention on appeal that plaintiffs' practical difficulties were "self-created" in the strict sense of the term is not dispositive of the case at bar. Whether a difficulty is self-

created is clearly one consideration a zoning board of appeals should take into account when deciding whether to grant a non-use variance. See, e.g., *Cryderman v City of Birmingham*, 171 Mich App 15, 21; 429 NW2d 625 (1988) (citation omitted) (noting that "[i]t is entirely proper for the board of appeals to take into account the requirement that hardship not be self-created and that the plight of the landowner be due to the unique circumstances of the property").

However, the record on appeal, along with the record of the city council's zoning decisions from March 1, 2004 to November 21, 2005, clearly show that the city council routinely granted variances for technically "self-created" difficulties. As such, the city council's treatment of self-created difficulties is inconsistent and does not indicate a proper exercise of reasonable discretion. For instance, during the meeting at which Mr. Bishop requested the variance at issue, one other variance request was decided by the city council. In this request, the city council allowed a petitioner to install a 15 foot by 24 foot above-ground swimming pool with a total ground coverage of 41%, where the city's regulations provide that the maximum permissible ground coverage is 35%. The petitioner requesting this variance had failed to bring any written letters from her neighbors indicating their approval of her proposed project. Further, she candidly admitted that she had not even asked for the approval of the neighbor behind her. Most importantly, though, her practical difficulty was self-created, in the sense that nothing precluded her from constructing a smaller pool. Nevertheless, the city council unanimously approved her variance request.

Plaintiffs have also provided the Court with a record of 28 variance requests which were brought before the city council between March 1, 2004, and November 21, 2005. This record indicates that only two of these requests were denied. Of the requests granted, nine of them were for garage height variances, and several of these were for variances of two feet. Once again, the

"practical difficulties" supporting these variances were presumably "self-created" in the strict sense of the term. The fact that the city council routinely grants height variances to address presumably "self-created" practical difficulties belies defendants' present contention that no variances should be granted in such cases. Given the fact that the city council routinely granted variance requests to remedy other technically self-created practical difficulties, to the extent that the city council denied plaintiffs' variance request solely because plaintiffs' practical difficulties were technically self-created, the city council's denial of plaintiffs' variance request was arbitrary and capricious.

Nevertheless, there are other factors a zoning board of appeals may consider when deciding whether to grant a non-use variance. These factors include (1) whether compliance with the strict letter of the zoning ordinance would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome; (2) whether the variance would do substantial justice to the landowner and the other property owners in the area, or whether a lesser variance than applied for would give substantial relief to the landowner more consistent with the interests of neighboring property owners; and (3) whether relief can be granted such that the spirit of the ordinance will be observed, while promoting public safety and welfare. *National Boatland, Inc v Farmington Hills Zoning Bd*, 146 Mich App 380, 388; 380 NW2d 472 (1985) (citation omitted); and see *Norman*, *supra* at 203.

In the case at bar, defendants did not address any of these considerations. In denying plaintiffs' request for a variance, the city council members failed to specify any factual findings underlying their decision. Rather, they simply brought the matter for a vote and denied plaintiffs' request. As such, the city council failed to make adequate factual findings on the

record in support of its decision.

Even more importantly, the Court is satisfied that the pertinent factors cannot reasonably be construed to disfavor plaintiffs. Based on the drainage of plaintiffs' lot, compliance with the letter of the zoning restrictions would have made conformity with the height restrictions unnecessarily burdensome. Likewise, the representations made by the city's building inspector could have reasonably led plaintiffs to believe that the addition of concrete blocks (to bring the structure in compliance with the city's rules regarding drainage) predominated over concerns regarding the height of the garage.

Further, granting the variance would also "do substantial justice" to plaintiffs, without having any significant impact on the other property owners in the area. Three of plaintiffs' four contiguous neighbors expressed their support for plaintiffs' variance request. The only neighbors who objected to the variance request claimed that plaintiffs had damaged their property during the construction of the garage and should not be allowed "to do whatever they please." It is noteworthy, however, that they did not allege that the *height* of the garage—the sole issue before the city council—had any detrimental impact on them. The Court notes that the objecting neighbors would actually be more likely to suffer a duplication of the harm they allegedly suffered during the construction of plaintiffs' garage if this Court were to uphold the decision of the city council and order plaintiffs to remove their garage.

Finally, the Court believes that granting plaintiffs' height variance will preserve the spirit of the ordinance, while promoting public safety and welfare. Plaintiff's garage is less than two feet higher than permitted. This non-conformity is relatively *de minimis*, and is not readily discernable upon casual inspection. Frankly, the relative innocuousness of the violation is elucidated by the fact that a city building inspector initially approved the garage. Therefore, the

Court is satisfied that granting plaintiffs' variance request is consistent with the spirit of the zoning ordinance.

This Court has carefully reviewed the record on appeal, and finds that the decision of the city council was not supported by competent, material, and substantial evidence on the record. Further, the Court finds that the city council's decision was not a proper exercise of reasonable discretion. To the contrary, the record on appeal indicates that the city council's decision was arbitrary and capricious, and as such, must be reversed.

For the reasons set forth above, the decision of the City of St. Clair Shores' Zoning Board of Appeals is REVERSED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

JAMES M. BIERNAT, Circuit Judge

JMB/kmv

DATED: June 30, 2006

cc: Dennis Zak, Attorney at Law

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